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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 NANCY R.,

12 Plaintiff,

13 v.

14 NANCY A. BERRYHILL,
15 Acting Commissioner of Social Security
16 Administration,

17 Defendant.
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Case No. SA CV 17-434-SP

MEMORANDUM OPINION AND
ORDER

19 I.

20 **INTRODUCTION**

21 On March 13, 2017, plaintiff Nancy R. filed a complaint against defendant,
22 the Commissioner of the Social Security Administration (“Commissioner”),
23 seeking a review of a denial of a period of disability and disability insurance
24 benefits (“DIB”). The court deems the matter suitable for adjudication without
25 oral argument.

26 Plaintiff presents four disputed issues for decision that can be characterized
27 as the following three: (1) whether the administrative law judge (“ALJ”) properly
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1 considered the credibility of plaintiff's subjective complaints; (2) whether the ALJ
2 properly considered the opinions of plaintiff's treating physicians; and (3) whether
3 the ALJ erred at step two. Memorandum in Support of Plaintiff's Complaint ("P.
4 Mem.") at 1-12; *see* Memorandum in Support of Defendant's Answer ("D. Mem.")
5 at 2-15.

6 Having carefully studied the parties' memoranda on the issues in dispute, the
7 Administrative Record ("AR"), and the decision of the ALJ, the court concludes
8 that, as detailed herein, the ALJ failed to properly assess plaintiff's subjective
9 complaints, failed to properly consider one treating physician's opinion, and failed
10 to properly consider evidence of migraines at step two. The court therefore
11 remands this matter to the Commissioner in accordance with the principles and
12 instructions enunciated herein.

13 II.

14 **FACTUAL AND PROCEDURAL BACKGROUND**

15 Plaintiff was sixty-two years old on the alleged disability onset date and has
16 a law degree. AR at 54, 91. Plaintiff has past relevant work as a supervising
17 attorney. *Id.* at 86-87.

18 On July 10, 2014, plaintiff filed an application for a period of disability and
19 DIB, alleging an onset date of March 5, 2014 due to rheumatoid arthritis and
20 osteoarthritis. *Id.* at 91. The Commissioner denied plaintiff's application initially
21 and upon reconsideration, after which she filed a request for a hearing. *Id.* at 110-
22 13, 117-23.

23 Plaintiff, represented by a non-legal representative, appeared and testified at
24 a hearing before the ALJ on August 4, 2015. *Id.* at 49-90. The ALJ also heard
25 testimony from David Rinehart, a vocational expert. *Id.* at 85-89. On September
26 25, 2015, the ALJ denied plaintiff's claim for benefits. *Id.* at 38-44.

27 Applying the well-known five-step sequential evaluation process, the ALJ
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1 found, at step one, that plaintiff had not engaged in substantial gainful activity
2 since March 5, 2014, her alleged disability onset date. *Id.* at 40.

3 At step two, the ALJ found plaintiff suffered from the following severe
4 impairments: degenerative disc disease of the cervicothoracic spine; chronic pain
5 syndrome; rheumatoid arthritis; and lumbar spine strain. *Id.*

6 At step three, the ALJ found plaintiff's impairments, whether individually or
7 in combination, did not meet or medically equal one of the listed impairments set
8 forth in 20 C.F.R. part 404, Subpart P, Appendix 1. *Id.*

9 The ALJ then assessed plaintiff's residual functional capacity ("RFC"),¹ and
10 determined she had the RFC to perform light work, with the limitations that she
11 could: frequently use hand controls bilaterally; occasionally perform postural
12 activities; occasionally perform above-the-shoulder reaching bilaterally; and
13 frequently handle and finger bilaterally. *Id.* at 41. The ALJ also determined
14 plaintiff should avoid concentrated exposure to extreme cold, vibration, fumes,
15 odors, dust, gases, and poor ventilation. *Id.*

16 The ALJ found, at step four, that plaintiff could perform her past relevant
17 work as a supervising attorney. *Id.* at 43. Consequently, the ALJ concluded
18 plaintiff did not suffer from a disability as defined by the Social Security Act. *Id.*

19 Plaintiff filed a timely request for review of the ALJ's decision, which was
20 denied by the Appeals Council on February 17, 2017. *Id.* at 1-3. The ALJ's
21 decision stands as the final decision of the Commissioner.

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24 ¹ Residual functional capacity is what a claimant can do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-
26 56 n.5-7 (9th Cir. 1989). "Between steps three and four of the five-step evaluation,
27 the ALJ must proceed to an intermediate step in which the ALJ assesses the
28 claimant's residual functional capacity." *Massachi v. Astrue*, 486 F.3d 1149, 1151
n.2 (9th Cir. 2007).

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1 IV.

2 DISCUSSION

3 A. The ALJ Failed to Properly Assess Plaintiff's Subjective Complaints

4 Plaintiff argues the ALJ failed to properly assess the credibility of her
5 subjective complaints. P. Mem. at 1-7. Specifically, plaintiff contends the reasons
6 the ALJ cited for discounting her testimony were not clear and convincing and
7 supported by substantial evidence. *Id.*

8 The ALJ must make specific credibility findings, supported by the record.
9 Social Security Ruling ("SSR") 96-7p.² To determine whether testimony
10 concerning symptoms is credible, the ALJ engages in a two-step analysis.
11 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). First, the ALJ
12 must determine whether a claimant produced objective medical evidence of an
13 underlying impairment "which could reasonably be expected to produce the pain
14 or other symptoms alleged." *Id.* at 1036 (quoting *Bunnell v. Sullivan*, 947 F.2d
15 341, 344 (9th Cir. 1991) (en banc)). Second, if there is no evidence of
16 malingering, an "ALJ can reject the claimant's testimony about the severity of her
17 symptoms only by offering specific, clear and convincing reasons for doing so."
18 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Benton v. Barnhart*, 331
19 F.3d 1030, 1040-41 (9th Cir. 2003). The ALJ may consider several factors in
20 weighing a claimant's credibility, including: (1) ordinary techniques of credibility
21 evaluation such as a claimant's reputation for lying; (2) the failure to seek
22 treatment or follow a prescribed course of treatment; and (3) a claimant's daily

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24 ² "The Commissioner issues Social Security Rulings to clarify the Act's
25 implementing regulations and the agency's policies. SSRs are binding on all
26 components of the SSA. SSRs do not have the force of law. However, because
27 they represent the Commissioner's interpretation of the agency's regulations, we
28 give them some deference. We will not defer to SSRs if they are inconsistent with
the statute or regulations." *Holohan v. Massanari*, 246 F.3d 1195, 1203 n.1 (9th
Cir. 2001) (internal citations omitted).

activities. *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Bunnell*, 947 F.2d at 346-47.

At the first step, the ALJ here found plaintiff's medically determinable impairments could reasonably be expected to cause the symptoms alleged. AR at 41. At the second step, because the ALJ did not find any evidence of malingering, the ALJ was required to provide clear and convincing reasons for discounting plaintiff's credibility. The ALJ found plaintiff's testimony to be not entirely credible because her alleged symptoms were: (1) inconsistent with her treatment history; (2) inconsistent with her activities of daily living; and (3) inconsistent with the objective medical evidence. *Id.* at 41-42.

At the hearing, plaintiff testified that she suffered from rheumatoid arthritis, migraines, neck pain and spasms, lower back pain, and hip pain. *Id.* at 59, 63, 65-68. Plaintiff testified that sitting aggravated her pain and the pain triggered her migraines. *Id.* 63-69. Although physical therapy and other exercises helped, she still had pain. *Id.* at 67-68. When sitting with the correct posture on the correct chair at an ergonomic table, plaintiff could sit and read for about an hour before pain would radiate in her neck and she would need to get up and move around. *Id.* at 74-75, 80-81. Plaintiff explained that sitting with correct posture reduced the pain but she got fatigued holding that position. *Id.* at 83. Plaintiff further testified that she could lift twenty pounds but only ten pounds comfortably, walking a long time affected her feet, and she could reach above with pain but could not grasp everything. *Id.* at 73, 76, and 81-82. As for her activities, plaintiff exercised on a daily basis, attended a few lectures, cooked, read, and shopped for food. *Id.* at 77-79. Plaintiff explained she used to garden and hand weave but had to reduce both activities due to her symptoms. *Id.* at 79.

In an undated Function Report, plaintiff stated that her neck pain most significantly impacted her ability to work because it caused her to change positions

1 frequently, have migraines, and affected her focus and concentration. *Id.* at 250.
2 Plaintiff, among other things, had to be careful when she lifted items, could only
3 squat slowly, fatigued easily when she walked, could only sit about twenty minutes
4 at a time, and experienced pain and stiffness in her hands if she used them too
5 much. *Id.* at 256. As for her activities, plaintiff reported that she prepared simple
6 meals such as salads and sandwiches, did small loads of laundry, washed dishes
7 once a week, read the newspaper with multiple breaks, wove twice a week with
8 breaks every thirty minutes, gardened once a week for about fifteen minutes, and
9 attended a weaving club meeting twice a month. *Id.* at 252-55.

10 The ALJ's first reason for finding plaintiff's testimony less credible was that
11 her alleged symptoms were inconsistent with her treatment history, which showed
12 effective treatment. *Id.* at 42; *see Molina v. Astrue*, 674 F.3d 1104, 1113 (9th Cir.
13 2012) (response to treatment supports an adverse credibility determination).
14 Specifically, the ALJ noted that plaintiff met her goals by the completion of
15 physical therapy, reported no pain or further limitations following therapy for
16 spinal mobility, reported to her treating physician that she was doing better and
17 able to live with her pain level, and reported a pain level of 0/10 in June 2015. AR
18 at 42. Although the ALJ correctly noted that plaintiff achieved her goals at
19 physical therapy and had no pain at many of the sessions, the ALJ's determination
20 that plaintiff's symptoms were inconsistent with the treatment notes was
21 nevertheless not clear and convincing because it was based on a selective reading
22 of the treatment notes.

23 Since the alleged onset date, plaintiff underwent three sessions of physical
24 therapy – a session in 2014 for the mobility deficits in her right hip and lumbar
25 spine and sessions in 2014 and 2015 for mobility deficits related to her thoracic
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1 and cervical spine.³ *See id.* at 331-34, 340-43, 537-39. With regard to plaintiff's
2 lumbar and hip pain, plaintiff was discharged from physical therapy after achieving
3 her goal – to be able to sit with proper lumbar spine positioning for one hour. *See*
4 *id.* at 338-39. As for plaintiff's cervical and thoracic spine, plaintiff was
5 discharged from physical therapy in 2014 after having met her goals of being able
6 to sit with proper posture for reading for two hours and being able to sleep at night
7 without waking although with some pain. *See id.* at 349. Plaintiff was again
8 referred to physical therapy in 2015 because she continued to suffer from neck
9 pain, she developed pain in her left upper trapezius, headaches/migraines resulted
10 from the pain, and she could not sit at a computer for fifteen minutes. *See id.* at
11 537-38. Although plaintiff had no pain during a June 2015 physical therapy
12 session and reported that her neck pain would go away when she sat with correct
13 posture, she also reported she could only maintain proper posture for short periods.
14 *See id.* at 685-86.

15 Looking at the treatment notes as a whole, they were not inconsistent with
16 plaintiff's symptoms. First, with regard to plaintiff's hip and lumbar spine, the
17 physical therapy was successful but the goal was simply for plaintiff to be able to
18 sit for one hour. *See id.* at 338-39. The ability to sit for one hour was consistent
19 with plaintiff's testimony and did not demonstrate full functionality. Similarly,
20 with respect to plaintiff's neck pain, plaintiff achieved her goal of being able to sit
21 for two hours in 2014. But plaintiff continued to experience pain at times when
22 sitting, which eventually required her to undergo more physical therapy in 2015.
23 And even though plaintiff did not have pain during many of the physical therapy
24 sessions, she continued to experience incidences of neck pain and was unable to sit
25 with postural endurance for longer periods. *Id.* at 685-86. Accordingly, even
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27 ³ Prior to 2014, plaintiff had undergone physical therapy an unknown number
28 of times. *See AR* at 304, 310-11.

1 though plaintiff's physical therapy was technically effective, the goals were very
2 limited and the treatment notes indicate plaintiff was not always pain-free.
3 Plaintiff continued to suffer from limitations and required additional physical
4 therapy. Contrary to the ALJ's assessment, these documented limitations were
5 consistent with plaintiff's testimony.

6 The ALJ's second reason for his adverse credibility determination was that
7 plaintiff's activities of daily living were inconsistent with her symptoms. *Id.* at 42;
8 *see Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002) (in making a
9 credibility determination, an ALJ may consider inconsistencies between a
10 claimant's testimony and conduct). The ALJ found that plaintiff's ability to
11 exercise – yoga, swimming, and walking – as well as travel to Japan indicated that
12 her symptoms were not as limiting as she testified. AR at 42. Plaintiff's physical
13 therapist prescribed exercise in order to alleviate the pain. *See, e.g.*, AR at 73, 304,
14 335. The fact that plaintiff was exercising to adhere to her treatment plan and
15 alleviate the pain was therefore not a clear and convincing reason to discount her
16 alleged symptoms.

17 Similarly, plaintiff's trip to Japan was not a clear and convincing reason to
18 find her less credible. *See Wilson v. Comm'r*, 303 Fed. Appx. 565, 566 (9th Cir.
19 2008) (fact that plaintiff went on a vacation was not a clear and convincing reason
20 to discount her credibility). Plaintiff was not traveling on a regular basis and this
21 was not an activity-filled vacation. Instead, she made an extended visit to Japan to
22 visit friends. AR at 84. During this visit, plaintiff did not go sight seeing and
23 instead would just walk around a bit each day and socialize with friends. *Id.* The
24 trip did not suggest that plaintiff's abilities were greater than she alleged. *See*
25 *Howard v. Heckler*, 782 F.2d 1484, 1488 (9th Cir. 1986) (the capacity to engage in
26 periodic, restricted travel was not a clear and convincing reason to find plaintiff
27 less credible); *but see Tommasetti*, 533 F.3d at 1040 (plaintiff's ability to travel to
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1 Venezuela to care for her ailing sister was a clear and convincing reason to
2 discount her credibility).

3 Finally, the ALJ discounted plaintiff's credibility because her symptoms
4 were unsupported by objective medical evidence. AR at 42; *see Rollins v.*
5 *Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (lack of corroborative objective
6 medical evidence may be one factor in evaluating credibility). Acknowledging that
7 diagnostic images reflected degenerative spinal changes, the ALJ nevertheless
8 determined the objective medical evidence did not support plaintiff's claims
9 because there was no evidence of stenosis, other nerve impact, or significant
10 neurologic deficits aside from a slight loss of grip strength.⁴ AR at 42. The ALJ
11 was incorrect. An April 2011 MRI of the cervical spine showed that plaintiff
12 suffered from multilevel disc and facet degenerative changes and multilevel
13 foraminal stenosis, and an October 2013 x-ray showed multilevel degenerative disc
14 disease and anterior superior flattening of the superior endplate of C5. *Id.* at 286,
15 308. Indeed, one of the State Agency physicians, whose opinion the ALJ assigned
16 great weight, stated the diagnostic images showed plaintiff suffered from "fairly
17 significant" degenerative disc disease and multilevel foraminal stenosis. *Id.* at 93.
18 Thus, although there was no objective medical evidence supporting significant
19 neurologic deficits, the diagnostic images clearly reflected conditions that
20 supported plaintiff's complaints.

21 In sum, the ALJ's three reasons for finding plaintiff's testimony not entirely
22 credible were not clear and convincing and supported by substantial evidence. As
23 such, the ALJ erred in discounting plaintiff's subjective complaints.

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27 ⁴ Defendant suggests diagnostic images taken prior to the alleged onset date
28 were not relevant to the discussion. *See* D. Mem. at 4, 14. These images were not
so remote in time as to provide no guidance.

1 **B. The ALJ Failed to Properly Consider the Opinion of One of Plaintiff's**
2 **Treating Physicians**

3 Plaintiff argues the ALJ failed to properly consider the opinions of her two
4 treating physicians, Dr. Patricia S. Hong and Dr. Randy Richard Lehmer. P. Mem.
5 at 7-10. Specifically, plaintiff contends that the ALJ discounted both their
6 opinions without providing specific and legitimate reasons. *Id.*

7 In determining whether a claimant has a medically determinable impairment,
8 among the evidence the ALJ considers is medical evidence. 20 C.F.R.
9 § 404.1527(b).⁵ In evaluating medical opinions, the regulations distinguish among
10 three types of physicians: (1) treating physicians; (2) examining physicians; and
11 (3) non-examining physicians. 20 C.F.R. § 404.1527(c), (e); *Lester v. Chater*, 81
12 F.3d 821, 830 (9th Cir. 1996) (as amended). “Generally, a treating physician’s
13 opinion carries more weight than an examining physician’s, and an examining
14 physician’s opinion carries more weight than a reviewing physician’s.” *Holohan*,
15 246 F.3d at 1202; 20 C.F.R. § 404.1527(c)(1)-(2). The opinion of the treating
16 physician is generally given the greatest weight because the treating physician is
17 employed to cure and has a greater opportunity to understand and observe a
18 claimant. *Smolen*, 80 F.3d at 1285; *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
19 Cir. 1989).

20 Nevertheless, the ALJ is not bound by the opinion of the treating physician.
21 *Smolen*, 80 F.3d at 1285. If a treating physician’s opinion is uncontradicted, the
22 ALJ must provide clear and convincing reasons for giving it less weight. *Lester*,
23 81 F.3d at 830. If the treating physician’s opinion is contradicted by other
24 opinions, the ALJ must provide specific and legitimate reasons supported by
25 substantial evidence for rejecting it. *Id.* at 830. Likewise, the ALJ must provide
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27 ⁵ All citations to the Code of Federal Regulations refer to regulations
28 applicable to claims filed before March 27, 2017.

1 specific and legitimate reasons supported by substantial evidence in rejecting the
2 contradicted opinions of examining physicians. *Id.* at 830-31. The opinion of a
3 non-examining physician, standing alone, cannot constitute substantial evidence.
4 *Widmark v. Barnhart*, 454 F.3d 1063, 1066-67 n.2 (9th Cir. 2006); *Morgan v.*
5 *Comm'r*, 169 F.3d 595, 602 (9th Cir. 1999); *see also Erickson v. Shalala*, 9 F.3d
6 813, 818 n.7 (9th Cir. 1993).

7 **1. Treating Physicians**

8 Dr. Patricia S. Hong, a physiatrist, treated plaintiff from September 2013
9 through the date of the hearing. *See* AR at 304-07, 527-31. At the initial visit, Dr.
10 Hong reviewed plaintiff's history, observed plaintiff had scattered tenderness over
11 the mid-low cervical paraspinals, ordered an x-ray of the cervical spine, and
12 referred plaintiff to physical therapy. *See id.* at 304-07. Although plaintiff initially
13 reported improved neck pain, Dr. Hong subsequently observed limited range of
14 motion, tightness, and pain in the neck. *See id.* at 327, 346, 529. Dr. Hong also
15 observed plaintiff had tenderness and pain in her hips and trochanter and
16 tenderness in the back. *See id.* at 329, 346. In an insurance form dated April 22,
17 2014, Dr. Hong opined plaintiff had the functional capacity to perform part-time
18 sedentary work (four hours a day) with the limitations that plaintiff could: sit for
19 one hour at a time for four hours; stand or walk thirty minutes at a time for two
20 hours; and lift ten pounds frequently and twenty pounds occasionally. *Id.* at 210-
21 11. In addition, Dr. Hong opined plaintiff was limited in her ability to use her
22 hands, perform fine finger movements, and engage in eye/hand movements
23 repetitively. *Id.* at 211. Dr. Hong also prohibited plaintiff from climbing and
24 engaging in repetitive twisting, bending, and stooping. *Id.* Dr. Hong cited
25 plaintiff's limited range of motion in the neck, tenderness, pain, and fatigue as the
26 bases for her opinion. *Id.*

27 Dr. Randy Richard Lehmer, a rheumatologist, treated plaintiff's rheumatoid
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1 arthritis. Dr. Lehmer observed that plaintiff showed great improvement in joint
2 swelling with Enbrel. *Id.* at 296, 317. Plaintiff complained of chronic neck pain
3 and fatigue to Dr. Lehmer, who observed that imaging showed plaintiff suffered
4 from cervical spondylosis. *See* 296, 317-18, 444. In a work status report dated
5 March 6, 2014, Dr. Lehmer diagnosed plaintiff with rheumatoid arthritis and
6 chronic neck pain, placed her off work through March 2015, and opined that she
7 was disabled from her current job. *Id.* at 315.

8 **2. State Agency Physicians**

9 Dr. M. Mazury and Dr. M. Bayer, State Agency physicians, reviewed
10 plaintiff's medical records and opined plaintiff had the RFC to: lift or carry twenty
11 pounds occasionally and ten pounds frequently; stand or walk six hours in an eight-
12 hour workday; sit six hours in an eight-hour workday; occasionally climb ramps,
13 stairs, ladders, ropes, and scaffolds; occasionally balance, stoop, kneel, crouch, and
14 crawl; occasionally reach overhead; and frequently handle and finger bilaterally.
15 *See id.* at 93-96, 103-05. Both physicians also opined environmental limitations.
16 *See id.* at 96-97, 106. Dr. Mazury reviewed plaintiff's medical records from
17 February through May 2014 and Dr. Bayer reviewed medical records through
18 August 2014. *See id.* at 93, 103.

19 **3. The ALJ's Findings**

20 The ALJ determined that plaintiff had the RFC to perform light work with
21 postural, environmental, reaching, and manipulative limitations. *Id.* at 41. In
22 reaching that determination, the ALJ gave great weight to the opinions of the State
23 Agency physicians because they were well-supported by the medical evidence and
24 not inconsistent with evidence presented at the hearing level. *Id.* at 42-43. The
25 ALJ gave no weight to the opinion of Dr. Hong because her opinion that plaintiff
26 could only work four hours a day was inconsistent with the evidence and plaintiff's
27 reported and demonstrated functional ability. *Id.* at 43.

1 **4. The ALJ Failed to Properly Consider Dr. Hong's Opinion**

2 The ALJ failed to properly consider Dr. Hong's opinion that plaintiff could
3 only work four hours a day. Although the ALJ did not expressly state it, his
4 rejection of the four-hour limitation was a rejection of Dr. Hong's sitting, standing,
5 and walking limitations. The ALJ did not opine any sitting, standing, and walking
6 limitations, while Dr. Hong opined plaintiff only had the functional capacity to
7 perform sedentary work with the additional limitations of sitting for one hour at a
8 time for four hours and standing or walking thirty minutes at a time for two hours,
9 which appeared to be the bases of the limitation to part-time work. *Compare id.* at 41
10 and 210.

11 The ALJ rejected Dr. Hong's opinion that plaintiff was only capable of part-
12 time work because it was inconsistent with the evidence of record as a whole. *Id.*
13 at 43. But as discussed above, the evidence in fact consistently showed that
14 plaintiff had sitting and standing limitations. Diagnostic images show that plaintiff
15 suffered from, among other things, multilevel degenerative disc disease and
16 multilevel foraminal stenosis. *Id.* at 286, 308. Plaintiff underwent physical
17 therapy for her back, hip, and neck pain. Although the physical therapy notes
18 indicated that the goals were met, the goals were not for plaintiff to obtain full
19 functionality but only to be able to sit for one or two hours at a time and sleep
20 through the night. *See id.* at 338-39, 349. Further, even though plaintiff met the
21 goal of being able to sit for two hours in 2014, her condition deteriorated and she
22 had to undergo physical therapy again in 2015 due to increased pain. The
23 treatment notes indicate that as of June 2015, she was incapable of sitting for long
24 periods of time. *See id.* at 686. In short, the record supported Dr. Hong's opinion
25 that plaintiff was only capable of working four hours a day due to her sitting,
26 standing, and walking limitations.

1 **5. The ALJ Properly Rejected Dr. Lehmer's Opinion**

2 Plaintiff also contends that the ALJ failed to consider Dr. Lehmer's opinion
3 that plaintiff was disabled from her job and was not expected to recover. P. Mem.
4 at 9-10. The ALJ did not err.

5 The ALJ has a duty to consider all relevant medical evidence to reach an
6 RFC determination. *See* 20 C.F.R. § 404.1545(a)(1) (it is the responsibility of the
7 ALJ to reach an RFC determination by reviewing and considering all of the
8 relevant evidence). But the ALJ is not required to discuss every piece of evidence.

9 Here, the record contains three treatment notes from Dr. Lehmer, only one of
10 which was after the alleged onset date, communications between Dr. Lehmer and
11 plaintiff prior to her trip to Japan, and a work status report completed by Dr.
12 Lehmer. *See* AR at 296, 315-17, 427-29, 444-45. The ALJ did not discuss the
13 treatment records which reflected that prior to the alleged onset date, plaintiff had
14 improvement in her joint swelling with Embrel, but that she suffered from neck
15 pain that made it difficult to work, as well as fatigue. *Id.* at 296, 317. The
16 treatment notes also indicated that after undergoing physical therapy in 2014,
17 plaintiff still suffered from chronic neck pain but that it became more tolerable
18 after she stopped working because she no longer had to stare at a screen and could
19 vary her position at will. *Id.* at 444. But as plaintiff concedes, the ALJ did not
20 entirely ignore Dr. Lehmer's opinion. *See* P. Mem. at 9-10. Indeed, without
21 specifying Dr. Lehmer by name, the ALJ mentioned and considered Dr. Lehmer's
22 opinion. *See* AR at 42.

23 The ALJ therefore did not err. Dr. Lehmer offered no opinion other than a
24 limited disability determination, namely, that plaintiff was disabled from her job as
25 supervising attorney, not that she could not perform any work. *Id.* at 315-16. It
26 was within the ALJ's purview to make the ultimate disability determination. *See*
27 20 C.F.R. § 404.1527(d)(1); *Morgan v. Comm'r*, 169 F.3d 595, 600 (9th Cir.1999)

1 (“[T]he opinion of the treating physician is not necessarily conclusive as to either
2 the physical condition or the ultimate issue of disability.”). Had Dr. Lehmer
3 offered other opinions in addition to the ultimate disability determination, the ALJ
4 would have been required to provide specific and legitimate reasons for rejecting
5 the opinion of a treating physician. *See Smith v. Astrue*, 2011 WL 5294848, at *4
6 (N.D. Cal. Nov. 3, 2011) (“Although the treating physician's opinion is not
7 necessarily conclusive as to either a physical condition or the ultimate issue of
8 disability, an ALJ must provide ‘specific and legitimate reasons for rejecting the
9 opinion of the treating physician.’”) (quoting *Murray v. Heckler*, 722 F.2d 499,
10 502 (9th Cir. 1983)). But here, Dr. Lehmer did not opine any functional
11 limitations.

12 Accordingly, with respect to his consideration of the treating physicians’
13 opinions, the ALJ erred only in rejecting Dr. Hong’s opinion. The ALJ failed to
14 provide clear and convincing reasons supported by substantial evidence for
15 rejecting Dr. Hong’s opinion. But the ALJ properly discounted Dr. Lehmer’s
16 opinion.

17 **C. The ALJ Erred at Step Two**

18 Plaintiff argues the ALJ erred at step two because he failed to find her
19 migraines were a severe impairment. P. Mem. at 10-12. Specifically, plaintiff
20 contends the evidence demonstrated that plaintiff suffered from migraines and the
21 migraines had more than a minimal effect on her ability to work.

22 At step two, the Commissioner considers the severity of the claimant’s
23 impairment. 20 C.F.R. § 404.1520(a)(4)(ii). “[T]he step-two inquiry is a de
24 minimis screening device to dispose of groundless claims.” *Smolen*, 80 F.3d at
25 1290. “An impairment or combination of impairments can be found not severe
26 only if the evidence establishes a slight abnormality that has no more than a
27 minimal effect on an individual’s ability to work.” *Id.* (citation and quotation
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1 marks omitted).

2 Here, the ALJ determined that plaintiff's migraine headaches did not
3 constitute a severe impairment because they did not result in any significant
4 functional impact. AR at 40. The ALJ did not discuss any of the evidence he
5 reviewed to reach this determination.

6 The ALJ's step two finding was not supported by substantial evidence.
7 Diagnostic images indicated plaintiff suffered from impairments, including
8 stenosis, that could cause chronic neck pain. *Id.* at 286, 308. As discussed above,
9 the evidence shows that plaintiff indeed complained of neck pain throughout the
10 relevant period. The evidence shows that, before and after the alleged onset date,
11 plaintiff consistently complained of migraines resulting from her neck pain, and
12 had a prescription for Imitrex. *See id.* at 63, 304, 327, 344, 528, 538. Although the
13 migraines were secondary to the neck pain, given the evidence documenting the
14 neck pain and plaintiff's testimony that the migraines would cause her to get to
15 work late, the evidence reasonably supports a finding that plaintiff's migraines had
16 more than a minimal effect on her ability to work.

17 In many instances, error at step two is harmless where, as here, the ALJ
18 found the claimant suffered from other severe impairments. *See Burch v.*
19 *Barnhart*, 400 F.3d 676, 682 (9th Cir. 2005) (any error by ALJ at step two was
20 harmless because the step was resolved in plaintiff's favor). This is particularly
21 true where it is apparent that in assessing the RFC the ALJ properly considered the
22 impairments that were erroneously found not severe. *See Lewis v. Astrue*, 498 F.3d
23 909, 911 (9th Cir. 2007) (the failure to address an impairment at step two is
24 harmless if the RFC discussed it in step four); 20 C.F.R. § 404.1545(a)(1)-(2) (an
25 ALJ must consider all relevant evidence, including non-severe impairments, in his
26 RFC determination). But here, the ALJ failed to account for plaintiff's migraines
27 in his RFC determination. As such, his error at step two was not harmless.

1 Accordingly, by failing to find that plaintiff suffered from the severe
2 impairment of migraines secondary to chronic neck pain, the ALJ erred at step two.
3 The ALJ's finding that plaintiff's migraines were not severe was not supported by
4 substantial evidence.

5 **V.**

6 **REMAND IS APPROPRIATE**

7 The decision whether to remand for further proceedings or reverse and
8 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
9 888 F.2d 599, 603 (9th Cir. 1989). It is appropriate for the court to exercise this
10 discretion to direct an immediate award of benefits where: "(1) the record has been
11 fully developed and further administrative proceedings would serve no useful
12 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting
13 evidence, whether claimant testimony or medical opinions; and (3) if the
14 improperly discredited evidence were credited as true, the ALJ would be required
15 to find the claimant disabled on remand." *Garrison v. Colvin*, 759 F.3d 995, 1020
16 (9th Cir. 2014) (setting forth three-part credit-as-true standard for remanding with
17 instructions to calculate and award benefits). But where there are outstanding
18 issues that must be resolved before a determination can be made, or it is not clear
19 from the record that the ALJ would be required to find a plaintiff disabled if all the
20 evidence were properly evaluated, remand for further proceedings is appropriate.
21 *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*,
22 211 F.3d 1172, 1179-80 (9th Cir. 2000). In addition, the court must "remand for
23 further proceedings when, even though all conditions of the credit-as-true rule are
24 satisfied, an evaluation of the record as a whole creates serious doubt that a
25 claimant is, in fact, disabled." *Garrison*, 759 F.3d at 1021.

26 Here, remand is required because the ALJ failed to properly assess plaintiff's
27 credibility, failed to properly consider Dr. Hong's opinion, and erred at step two.
28

1 On remand, the ALJ shall reconsider plaintiff's credibility and either accept her
2 testimony or provide clear and convincing reasons for rejecting it; reconsider Dr.
3 Hong's opinion and either credit the opinion or provide specific and legitimate
4 reasons supported by substantial evidence for rejecting it; and reconsider the
5 evidence concerning the migraines. The ALJ shall then reconsider plaintiff's
6 impairments at steps two and three, reassess plaintiff's RFC, and proceed through
7 steps four and five to determine what work, if any, plaintiff is capable of
8 performing.

9 **VI.**

10 **CONCLUSION**

11 IT IS THEREFORE ORDERED that Judgment shall be entered
12 REVERSING the decision of the Commissioner denying benefits, and
13 REMANDING the matter to the Commissioner for further administrative action
14 consistent with this decision.

15
16 DATED: March 22, 2019



17
18 SHERI PYM
United States Magistrate Judge